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ABSTRACT

Testimony concerning the Supreme Court decisions in the case of Grove City College v. Bell (1984) is presented in this document. The Courts ruling that Federal aid to a student constitutes funding only of the college's student air program, nor the entire institution, reflected the more persuasive reading of the Title IX Education Amendments, according to the U.S. Department of Justice. The administration has supported specific legislation to address civil rights issues in response to Grove City and has opposed the Civil Rights Restoration Act of 1987 (S. 557) for the following reasons: (1) the Act's expansion of mandatory abortion coverage, (2) its insufficient protection of religious tenets, and (3) the expanded federal authority it would grant over a wide range of activities. Legislation addressing the Grove City decision should contain abortion neutral language which would ensure that recipients of federal aid are neither required to provide or pay for abortions or abortion-related services nor precluded from doing so. Expansion of federal laws means expansion of the costs and burdens that attend these laws including increased federal paperwork requirements and random on site compliance reviews. The Civil Rights Restoration Act portends a vast expansion of federal jurisdiction into areas not covered by the Grove City decision. (SM)

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Department of Justice

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STATEMENT

OF

MARK R. DISLER
DEPUTY ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION

BEFORE

THE

COMMITTEE ON LABOR AND HUMAN RESOURCES
UNITED STATES SENATE

CONCERNING

GROVE CITY LEGISLATION

ON

APRIL 1, 1987

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Mr. Chairman and Members of the Committee, I welcome this opportunity to present the Department of Justice's views concerning legislation addressing the Supreme Court's decision in Grove City College v. Bell, 465 U.S. 555 (1984). Let me note at the outset that the Reagan Administration remains dedicated to the vigorous enforcement of federal civil rights laws. A fair-minded review of the Justice Department's actual civil rights record not only reveals a favorable comparison with the record of its predecessors, but in many respects demonstrates a record of enforcement and achievement exceeding prior efforts.

While I believe that the significant progress in civil rights that has been achieved over the last 25 years is generally acknowledged, more needs to be accomplished. We must be ever vigilant at all three levels of government to assure equal justice under the law.

The Grove City case involves one of four cross-cutting civil rights statutes, Title IX of the Education Amendments of 1972. Title IX forbids sex discrimination in education programs or activities receiving Federal financial assistance. The decision also affects the scope of three other similarly worded statutes forbidding discrimination in all programs or activities receiving Federal financial assistance: Title VI of the Civil Rights Act of 1964 (race, color, national origin); Section 504 of the Rehabilitation Act of 1973 (handicap); and the Age Discrimination Act of 1975 (age).

In Grove City, the Supreme Court decided that federal education aid to a student constitutes Federal financial assistance to the college, even though the college received no direct federal aid. The Court also ruled that because the student grants funded only the college's student aid program, it was that "program or activity", not the entire educational institution itself, that was covered by the antidiscrimination provision.

The second ruling, the program-specific ruling, broke no new legal ground. The coverage of the federally-aided program rather than the entire institution merely reflected the more persuasive reading of the plain language of Title IX (and the other three cross-cutting statutes). 1/ Similarly, Title IX's legislative history supports the Supreme Court's program-specific reading of its scope. And, the weight of caselaw before Grove City favored the program-specific reading. 2/ Nonetheless,

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1/ The Department of Education had not been adhering to this programmatic limitation prior to 1984.

2/ Compare, e.g., Hillsdale College v. Department of Health, Education and Welfare, 696 F.2d 418 (6th Cir. 1982) (Federal scholarship and loan aid to a college subjects only the college's student aid program to Title IX coverage), vacated and remanded in light of Grove City College v. Bell, 466 U.S. 901 (1984); Dougherty County School System v. Bell, 694 F.2d 78 (5th Cir. 1982) (reaffirming earlier decision holding that Title IX is program-specific); Rice v. President and Fellows of Harvard College, 663 F.2d 336 (1st Cir. 1981) (assistance provided to the Harvard Law School financial aid program, apparently through a college work-study program, does not constitute assistance to the entire law school educational program: Title IX complaint

(FOOTNOTE CONTINUED)

the Administration believed that there were sound policy reasons for congressional consideration of a measured and tailored legislative response to the Grove City decision, one that provided for institutional coverage under Title IX and the other three cross-cutting statutes of all educational institutions receiving Federal financial assistance. We support such legislation in the 100th Congress as we did in the last two Congresses.

(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

must allege discrimination in the particular assisted program within the institution), cert. denied, 456 U.S. 928 (1982); Brown v. Sibley, 650 F.2d 760, 769 (5th Cir. 1981) ("on the basis of the language of Section 504 and its legislative history, and on the strength of analogies to Title VI and Title IX, we hold that it is not sufficient, for purposes of bringing a discrimination claim under Section 504, simply to show that some aspect of the relevant overall entity or enterprise receives or has received some form of input from the federal fisc. A private plaintiff . . . must show that the program or activity with which he or she was involved, or from which he or she was excluded, itself received or was directly benefitted by federal financial assistance") (footnotes omitted); Simpson v. Reynolds Metals Co., 629 F.2d 1226 (7th Cir. 1980) (Federal aid to a company's work training program subjects only that program, not the entire company, to Section 504 coverage); Bachman v. American Society of Clinical Pathologists, 577 F. Supp. 1257 (D. N.J. 1983) (Federal aid to conduct seminars on alcohol abuse does not bring the society's activity of certifying medical technologists within Section 504 coverage); University of Richmond v. Bell, 543 F. Supp. 321 (E.D. Va. 1982) (University's intercollegiate athletic program not subject to Title IX coverage because it did not receive Federal financial assistance), with e.g., Haffer v. Temple University, 524 F. Supp. 531 (E.D. Pa. 1981), aff'd 688 F.2d 14 (3d Cir. 1982) (Title IX); Wright v. Columbia University, 520 F. Supp. 789 (E.D. Pa. 1981) (Section 504); Poole v. South Plainfield Board of Education, 490 F. Supp. 948 (D. N.J. 1980) (Section 504); Bob Jones University v. Johnson, 396 F. Supp. 597 (D. S.C. 1974), aff'd, 529 F.2d 514 (4th Cir. 1975) (Title VI).

At the same time, we are firmly of the view that an alternative bill, the Civil Rights Restoration Act of 1987, S. 557, is not at all well-suited to address the problem of discrimination today. To be sure, the Restoration Act's expansion of mandatory abortion coverage, and its insufficient protection of religious tenets, are cause for grave misgivings about the proposed legislation. But no less deeply disturbing, and indeed the one overriding flaw of that bill, is its vague and imprecise language that is calculated to grant sweeping, indeed virtually unfettered, federal authority over a wide range of activities, not because there is a demonstrated need to add in such a sweeping way to the existing fabric of federal civil rights laws, but on the theory that overly expansive legislation, even though duplicative in many respects, is preferable to a carefully drawn bill.

Make no mistake, in contrast to the Administration-supported measure, S. 557 represents perhaps one of the single greatest legislative expansions of federal power in the post-World War II era without a showing of justification for such expansion. In so doing, it ignores the principle of federalism; it subjects large segments of the private sector to unprecedented federal jurisdiction; and it is probably the most direct assault on religious values and religious institutions in recent times.

We remain strongly opposed to this bill.

Overall Framework In Which These Four Laws Operate

That the Grove City decision made no legal change in coverage under these four cross-cutting civil rights statutes does not mean that the decision should not be the occasion for consideration anew of the proper scope of these anti-discrimination provisions. It is appropriate to measure what we know today about civil rights enforcement generally, and under these laws, against Congress's original intention to define their scope programmatically and determine the need, if any, for adjustments.

In making this determination, we should bear in mind that we need a sense of perspective whenever we examine the precise role of a particular federal enforcement scheme, including a particular federal civil rights enforcement scheme. We need to recognize that laws such as these that are tied to federal aid fit into a larger enforcement pattern in the civil rights field.

On the books today are many statutes that didn't exist twenty-five years ago, along with the few original, pioneering civil rights statutes. For example, Title II of the Civil Rights Act of 1964 forbids discrimination in public accommodations. Title IV of that Act authorizes the United States to bring a school discrimination case where private parties are unable to do so. Title VII forbids discrimination in employment. The Fair Housing Act of 1968 forbids discrimination

in housing. The Age Discrimination in Employment Act of 1967 forbids discrimination on the basis of age in employment. Section 503 of the Rehabilitation Act of 1973 requires affirmative action in employment by federal contractors for handicapped persons. Executive Order 11246 forbids discrimination by federal contractors on the basis of race, color, national origin, sex or religion. The Voting Rights Act of 1965 prohibits discrimination in the exercise of the franchise. Other federal protections exist. Sections 1981 and 1983 of Title 42 of the United States Code provide, in part, that all persons in the United States have the same rights as whites to make and enforce contracts, and that civil rights violations that occur under color of state law are prohibited under federal law. The Fifth Amendment and its Due Process Clause require the federal government to treat citizens equally under the law. The Fourteenth Amendment compels state governments and local governments to adhere to the principle of equal protection of the laws.

Thus, when we view these four necessary "cross-cutting" civil rights statutes in relation to that overall, necessary federal enforcement scheme -- and I haven't even mentioned state and local statutes which have proliferated in the last 25 years -- we must see their proper scope not in the imaginary vacuum that some of the proponents of the extremely expansive Grove City bill would suggest, but in the overall scheme of civil rights enforcement in this country.

Further, since 1964 when the first of these program-specific statutes tied to federal funding was adopted, Congress has enacted many more federal aid programs and much more federal aid is being dispensed by the federal government.

The medicaid program, for example, results in coverage of its funded activities. Thus, "program-specific" coverage yields broad coverage, but it does so in ways that can be reasonably defined and stops short of subjecting all public and private entities to coverage.

Costs of Unnecessary Government

When we expand federal laws, we expand the costs and burdens that attend those laws, as even a quick look at the Code of Federal Regulations demonstrates. When we trench on the "operating room" of states and localities and the private sector, we pay a price which can only be justified by a compelling public purpose and a demonstrated need. Justice Lewis Powell, joined by Chief Justice Burger and Justice O'Connor, aptly remarked upon this general concern in this very same Grove City case, even as they concurred in the result. Justice Powell described Grove City College as "an independent, coeducational liberal arts college. It describes itself as having 'both a Christian world view and a freedom philosophy,' perceiving these as 'interrelated'. . . . Apart from [the indirect assistance from enrolling students who themselves receive federal education aid], Grove City has followed an unbending policy of refusing all forms of government assistance, whether federal, state or local.

It was and is the policy of this small college to remain wholly independent of government assistance, recognizing -- as this case well illustrates -- that with acceptance of such assistance one surrenders a certain measure of the freedom that Americans always have cherished." Grove City College v. Bell, 465 U.S. 555, 576-77 (1984). (Emphasis supplied).

What does coverage under these laws mean? In summary, it would mean increased federal paperwork requirements; random on-site compliance reviews by federal agencies even in the absence of an allegation of discrimination; being subject to thousands of words of federal regulations; and increased exposure to costly private lawsuits and to the judgment of federal courts.

Consequently, where there is no demonstrated, compelling need for the growth of the federal government, it ill serves the American people to expand so greatly the federal government, just for the sake of doing so, as would be the case under S. 557. In the case of civil rights statutes, the question to be addressed is what problems remain -- what additional legislative action needs to be undertaken in light of the range of federal, state, and local laws now on the books, and the vast outlay of federal aid that gives vitality to these four cross-cutting statutes.

In our view, there is a demonstrated need to provide coverage of educational institutions in all of their educational activities, including athletic activities.

Since Grove City, there have been a significant number of instances where serious allegations of discrimination in educational institutions have not been satisfactorily addressed. With this demonstration of legitimate, current need, we believe that these four statutes should apply to educational and athletic activities of educational institutions whenever the institution receives any federal financial assistance. 3/ Thus, if federal

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3/ Some persons have argued that the Administration's proposal could codify, rather than overturn the Grove City decision. This argument derives from the definition of "education institution" currently found in Title IX. Under this definition, "administratively separate units" of a college or university can each be considered to be an "education institution." Thus it has been argued that the "administratively separate" language is ambiguous and could be construed to mean that internal departments of a school -- such as a student financial aid office -- should each be treated as a separate "education institution" under the bill.

Departmental regulations implementing Title IX, however, have always interpreted this "administratively separate" language as referring to a school, college, or department of an education institution, admission to which is independent of any other component of the institution. See, 34 C.F.R. § 106.2. Thus, under this definition, some professional and graduate schools may be considered "administratively separate units," and treated as separate "education institutions" (because they have admissions practices and procedures which are wholly independent of the admissions standards, practices, and procedures for other components of the university). However, it is our understanding of this definition that all undergraduate programs -- including athletics -- have always been treated as a single education institution under prior Department of Education practice and thus would be covered in their entirety under the bill.

This treatment of graduate and professional schools with independent admission standards as "administratively separate" is consistent with what is understood to have been agency enforcement practice prior to Grove City.

aid is given to any of a college's educational or athletic programs or activities, then all of that college's educational and athletic programs and activities will be subject to the four statutes. Moreover, under the legislation we support, a public elementary and secondary school system would be covered in its entirety if any school in the system received federal education aid. 34 C.F.R. 106.2(j) (defining "educational institution").

In all other applications of these statutes under the Administration's approach, the scope of the term "program or activity" is neither broadened nor narrowed by the bill and will be interpreted without regard to the Supreme Court's decisions in Grove City and North Haven Board of Education v. Bell (1982). 4/

In addition, in our view, legislation addressing the Grove City decision should provide for the abortion-neutral language of the Administration-supported measure. This language would ensure that no recipient of federal aid is either required to provide or pay for abortions or abortion-related services or precluded from doing so. This amendment is necessary so as to dispel any suggestion that the proposed legislation either directly or indirectly leaves in place current Title IX regulations that require an institution to treat abortion like any

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4/ In North Haven Board of Education v. Bell, 456 U.S. 512 (1982), the Supreme Court held, consistent with the Administration's position, that employees, as well as students, are protected by Title IX where Title IX coverage exists. At the same time, the Court noted the programmatic reach of Title IX.

other temporary disability "for all job-related purposes, including . . . payment of disability income . . . and under any fringe benefit offered to employees. . . ." 5/ 34 C.F.R. §106.57(c) (emphasis supplied). See also 34 C.F.R. §106.40(b)(4). 6/

Indeed, the regulations actually require discrimination in favor of abortion: an institution must provide leave for an abortion for both students and employees even when it "does not maintain a leave policy for its students [or employees, and when] a student [or employee] . . . does not otherwise qualify for leave under" the institution's leave policy. 34 C.F.R. 106.40(b)(5). See also 34 C.F.R. §106.57(d).

The abortion-neutral language was sponsored by Congressmen Tom Tauke and F. James Sensenbrenner, Jr. in the 99th Congress. It was adopted by the House Education and Labor Committee in May, 1985 during consideration of a Grove City bill.

5/ This abortion-neutral language is clearly consistent with the original meaning of Title IX when enacted. In 1972, when Title IX was adopted, abortion was illegal in virtually all states. Roe v. Wade, 410 U.S. 113 (1973), nullifying such laws, was decided by the Supreme Court in the following year. The Title IX regulations became final in 1975. Thus, the pro-abortion elements of the regulations appear to look to the Roe decision -- decided after Title IX's enactment -- rather than to Title IX itself. There is virtually no reason to believe that Congress intended Title IX to overturn state bans on abortion, let alone to mandate abortion coverage by institutions receiving federal aid.

6/ This regulation provides that an institution must treat abortion like any other temporary disability "with respect to any medical or hospital benefit, service, plan, or policy" for its students.

Further, in our view, Grove City legislation should address the issue of religious liberty. New religious tenets language in Title IX, included in the Administration-supported measure, protects an educational institution's policy which is based upon the tenets of a religious organization where the institution is controlled by, or closely identifies with the tenets of, the religious organization.

In 1972, when Congress enacted Title IX, Congress created several exceptions to its coverage, including: "This section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization. . . ." 20 U.S.C. §1681(a)(3).

At that time, many religious institutions were controlled outright by religious entities. Some of these institutions today are controlled by lay boards and thus outside the scope of the exception. Yet, they retain their close identification with the religious tenets of religious organizations. Thus, language has been added to the Administration-supported bill in order to protect a policy of such institutions based on religious tenets.

An institution cannot claim protection under this language with respect to Title VI, Section 504, or the Age Discrimination Act. The exception exists only under Title IX. 7/ The exception

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7/ A covered institution is not exempt in its entirety from Title IX if just one of its policies is based on religious tenets and conflicts with Title IX. The exception applies only to the specific policy or policies, based on religious tenets at those institutions able to avail themselves of the exception, when Title IX would conflict with such policy or policies.

recognizes that the tenets of some religious organizations differentiate in some ways between the sexes. In the spirit of diversity and pluralism in private education, the exception respects the independence of an institution's conduct in carefully delineated circumstances when the institution is controlled by, or closely identified with the religious tenets of, a religious organization. 8/

In May, 1985, in response to concerns about this issue, the House Education and Labor Committee first strengthened the current religious tenets exception when considering Grove City legislation. This particular language in the Administration-supported bill is modeled on language in the Higher Education Amendments of 1986, adopted by Congress and signed into law in October, 1986. There, a prohibition against religious discrimination in the construction loan program was enacted with an exception using the same language appearing in this bill. This bill's provision, in short, is modeled on language used by the 99th Congress just a few months ago. Indeed, I understand it emerged in a Conference in which this Committee participated.

8/ This exception will have no application in public schools. The First Amendment, as applied to states and localities, effectively prohibits public schools from basing any policies or conduct squarely on the religious tenets of a religious organization. This exception applies only to private institutions -- where students are in attendance because they have freely chosen to attend the institution.

The Administration-supported proposal, then, is a measured and fitting response to the Grove City decision within the overall framework of the total federal civil rights enforcement machinery today, the much vaster outlay of federal aid giving rise to significant jurisdiction under these statutes, and the actual demonstrated need.

If there are areas of demonstrated concern outside of education, then let us work together to address them. For example, the claim has been pressed, even after Grove City, that federal aid to airports brings within the scope of these laws airlines using the airports, even though the airlines received no federal aid. Further, the argument was made after Grove City that the federal air traffic controllers subjected to coverage commercial aviation using the controllers. Of course, if federal aid to an airport covers airlines using the airport, then entities using federally aided highways and seaports are necessarily covered by analogy. If federal air traffic controllers subject to coverage all commercial aviation, then entities using the National Weather Service would also be covered by analogy. The Department of Justice prevailed in resisting these arguments in the Supreme Court. United States Department of Transportation v. Paralyzed Veterans of America, 106 S. Ct. 2705 (1986). We also felt, however, that a problem for handicapped persons did exist in the airline industry. Therefore, the Administration supported an amendment to an

aviation program statute that banned discrimination against handicapped persons by airlines -- without the extremely broad ramifications of S. 557.

By contrast, S. 557 portends a vast expansion of federal jurisdiction over a whole host of public and private activities not covered before Grove City.

Without being exhaustive, some examples are:

- Grocery stores and supermarkets participating in the Food Stamp Program will be subject to coverage solely by virtue of their participation in that program. 9/
- Every school in a religious school system will be covered in its entirety if any one school within the school system receives even one dollar of federal financial assistance.
- An entire church or synagogue will be covered under Title VI, Section 504, and the Age Discrimination Act, if it operates one federally-assisted program or activity, as well as under Title IX if the federally-assisted program or activity is educational (with exceptions under Title IX in those circumstances where Title IX requirements conflict with religious tenets).
- Every division, plant, and subsidiary of a corporation principally engaged in the business of providing education, health care, housing, social services, or parks and recreation will be

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9/ This coverage did not exist before Grove City. Statement by Daniel Oliver, General Counsel, Department of Agriculture, to Senator Jesse Helms, July 1984.

covered in its entirety whenever one portion of one plant receives any federal financial assistance. 10/

- The entire plant or separate facility of all other corporations would be covered if one portion of, or one program at, the plant or facility receives any federal financial assistance. 11/

- A state, county, or local government department or agency will be covered in its entirety, whenever one of its programs receives federal aid. Thus, if a state health clinic is built with federal funds in San Diego, California, not only is the clinic covered, but all activities of the state's health department in all parts of the state are also covered.

- Farmers receiving crop subsidies and price supports will be subject to coverage. 12/

- Airlines, businesses using their own aircraft in their business activity, and commercial aviation generally will be covered if they use federally-assisted airports or the air traffic controller system.

- Entities using federally-assisted highways and seaports will be covered.

- Entities using the National Weather Service will be covered.

10/ Coverage in the private sector was program-specific before Grove City. Simpson v. Reynolds Metals Co., 629 F.2d 1226 (7th Cir. 1980); Bachman v. American Society of Clinical Pathologists, 577 F. Supp. 1257 (D. N.J. 1983); see Brown v. Sibley, 650 F.2d 760 (5th Cir. 1981).

11/ See footnote 10.

12/ Such coverage did not exist before Grove City. 110 Cong. Rec. 6545 (Sen. Humphrey) (March 30, 1964).

- A private, national social service organization will be covered in its entirety, together with all of its local chapters, councils, or lodges, if one local chapter, council, or lodge receives any federal financial assistance.

- Every college or university in a public system of higher education will be covered in its entirety if just one department at one school in that system receives federal financial assistance. 13/

- The commercial, non-educational activities of a school, college, or university, including rental of commercial office space and housing to those other than students or faculty, will be covered if the institution receives even one dollar of federal education assistance. 14/

- A school, college, or unversity investment policy and management of endowment will be covered if the institution receives even one dollar of federal education assistance. 15/

- A new, vague catch-all provison would provide additional coverage in uncertain ways.

The Administration-supported measure is a reasonable alternative. We urge its adoption.

13/ Such coverage did not exist before Grove City. Testimony of T.H. Bell, Civil Rights Act of 1984: Hearings on S. 2568, before the Subcommittee on th Constitution of the Senate Committee on the Judiciary, 98th Congress, 2d Sess., 227-228 (June 5, 1984).

14/ Such coverage did not exist before Grove City. Testimony of Harry M. Singleton, Civil Rights Restoration Act of 1985: Joint Hearings on H.R. 700 before the Committee on Education and Labor and the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 99th Congress, 1st Sess., 299-300 (March 7, 1985).

15/ See footnote 14.

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